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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-824

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

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v.

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NATIONAL ASSOCIATION OF BROADCASTERS, ET AL., PETITIONERS

v.

WNCN LISTENERS GUILD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA

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1. Respondents fail to come to grips with our central contention that nothing in the Communications Act of

1934 compels the Commission to review entertainment format changes whenever listeners "grumble" about the loss of an allegedly unique format. The general "public interest" standard that the Commission applies when considering license transfers and renewals does not mandate this kind of governmental intrusion. And respondents refer to no other statutory standard that does.

The Commission has concluded that the public interest in diversity in entertainment programming will best be served by reliance on competition among broadcasters rather than on government regulation. The Commission's judgment as to the best method of furthering the public interest in this respect is entitled to judicial deference, particularly when the Commission is required to accommodate "diversity" and other values inherent in the public interest standard. *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 803-814 (1978).[1]

At bottom, respondents' assertion that the public interest demands proliferation of allegedly "unique" entertainment formats rests on nothing but their own subjective preference,[2] is wholly wanting in support from

[1]Respondents argue (Br. 32) that this Court should not defer to the agency's interpretation of the public interest standard because reviewing courts are the "final arbiters of statutory construction." This Court's decisions, however, announce a different rule. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); *CBS* v. *Democratic National Committee*, 412 U.S. 94, 102-103 (1973).

[2]Respondents argue (Br. 83 n. 206) that there is little public interest value in diversity *within* formats, and suggest (Br. 84 n. 209) that even strong or widespread preferences of persons who desire diversity within format categories should count less than preferences of others who desire retention of "unique" formats. These arguments confirm Judge Tamm's observation (Pet. App. 54a) that the "format doctrine" "mandates regulation favoring the interests of fewer listeners over the interests of more listeners."

the Commission's prior precedents,[3] and conflicts with the intent of Congress as expressed in the legislative history.[4]

[3]Except in recent years when required to do so by the D.C. Circuit, the Commission never has required renewal or transfer applicants to justify abandonment of allegedly unique entertainment formats. See Pet. App. 72a. See also *En Banc Programming Inquiry*, 44 F.C.C. 2303, 2308-2309 (1960) (the choice of entertainment programming rests with the broadcaster). The Commission has required licensees to ascertain information needs in their service areas, but licensees need not conduct a survey of entertainment tastes. See *Ascertainment of Community Problems by Broadcast Applicants*, 57 F.C.C. 2d 418, 429, 442, 445 (1976); *Leflore Broadcasting Co., Inc.*, 36 F.C.C. 2d 101, 103 (1972). Thus, while it is true that, in comparative licensing proceedings, the Commission may give weight to the community's need for specialized foreign language or ethnic *non-entertainment* programming (*George E. Cameron Communications*, 71 F.C.C. 2d 460, 465-466 (1979)), the Commission has never considered the *entertainment* elements of proposed programming to be relevant in a comparative hearing (see *Flint Family Radio, Inc.*, 69 F.C.C. 2d 38, 52 (Rev. Bd. 1977) (Kessler, dissenting opinion)), or otherwise attempted to oversee entertainment formats.

[4]As demonstrated in our opening brief (Br. 27-30), the legislative history shows that Congress did not intend to require regulation of entertainment formats. Respondents argue that this history is irrelevant (Br. 72-73 n. 180), contending that it has no bearing on governmental review of entertainment formats in license renewal proceedings. However, the legislative history shows that Congress considered and rejected the concept of entertainment format regulation in individual licensing proceedings. For instance, in hearings leading to passage of the Radio Act of 1927, Rep. Reid asked "[i]s the fact that they are going to broadcast sacred music—does that have any more effect on getting a license than the fact that you are going to broadcast jazz?" *Radio Communication: Hearings on H.R. 5589 Before the House Comm. on Merchant Marine & Fisheries*, 69th Cong., 1st Sess. 37 (1926). He was told that under existing Department of Commerce regulation, no such preference was given. *Ibid.* Rep. Davis and others asked whether it would be a good idea in licensing cases to displace "jazz" with "high-class music," to use the "public interest" rationale "to afford a better and more wholesome set of programs," or to establish a "right of way" for "church music" on Sunday mornings. *Id.* at 38-40. Rep. White, the bill's sponsor, reminded them that language in an earlier bill (H.R. 7357, 68th Cong., 1st Sess., Section 1(B) (1924)) would have required

In an attempt to minimize the intrusive nature of the court of appeals' format doctrine, respondents also maintain (Br. 19 nn. 38, 39, 72 n. 177, 73 n. 184) that the doctrine is "narrow and limited" and merely requires the Commission to "consider" or "look at" format changes, rather than to "regulate" them. But the court of appeals clearly requires more than passive observation on the part of the agency. The Commission must hold a costly and time-consuming hearing, and then render a public interest determination on the licensee's application. If the Commission finds that a format change is not in the public interest, it must then (absent countervailing factors) deny the license renewal or transfer request, or condition a grant in favor of the licensee on retention of the "unique" format. See, *e.g.*, *Citizens Committee to Save WEFM* v. *FCC*, 506 F. 2d 246, 268 (D.C. Cir. 1974). Surely, this is "regulation."

The Commission has, of course, acknowledged that market allocation is not always "perfect" (Pet. App. 128a).[5] But no system for selecting entertainment

the Commission to "fix priorities as to subject matter" but had not been included in the new bill because "it involved censorship." *Id.* at 39-40. Evidently agreeing that the Commission should not be required to give preferences to particular entertainment formats, Congress chose not to reinsert the "priorities as to subject matter" language in the Radio Act or later in the Communications Act. See our initial brief at 28-29.

[5]Respondents appear to endorse the court of appeals' view that there is a "failure" of the market whenever a "unique" format is abandoned and "public grumbling" is forthcoming. In this view, competition is an appropriate policy only until the marketplace produces a result that the "grumblers" do not like. But there is no way that the Commission can step in when grumbling commences and determine whether preservation of an endangered format is in the public interest. The very possibility of agency intervention in these circumstances will chill experimentation necessary to produce arguably "unique" formats in the first place (Pet. App. 183a, 185a).

programming will ever be "perfect" in meeting the diverse and rapidly changing tastes of listeners. Moreover, regulation has its own substantial flaws, including the inherent elusiveness of format classification and the impossibility of ascertaining the breadth, intensity, and relative importance of entertainment tastes in concrete cases. In view of its inability to serve as an arbiter of public taste in entertainment programming, the Commission reasonably found that the radio marketplace, despite its imperfections, is "the best available means of producing the diversity to which the public is entitled." Pet. App. 128a.[6]

2. Respondents' First Amendment assertions are also wide of the mark. We recognize that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 390. As this Court has emphasized, however, the broadcasting system depends on "private broadcast journalism, held only broadly accountable to public interest standards." *CBS* v. *Democratic National Committee*, *supra*, 412 U.S. at 120. For this reason, broadcasters are entitled to exercise "the widest journalistic freedom consistent with their public obligations." *Id.* at 110.

[6]Respondents also argue (Br. 62) that broadcasters, influenced by advertisers, tend to "neglect the interests of all but the most demographically desirable consumers." However, this argument exaggerates the influence of audience "demographics" and ignores the "relevant and important question * * * whether programming reasonably corresponds to audience preference" (Pet. App. 87a). The Commission found no evidence that the entertainment tastes of the less demographically desirable consumers have been "ignored" by broadcasters (Pet. App. 182a). Gaps in the marketplace, which may temporarily result from shifts in formats, are quickly filled in a dynamic competitive environment. Pet. App. 68a.

Applying these principles, the Commission properly balanced the public's rights with those of broadcasters. The Commission concluded that the public interest in diversity in entertainment programming could best be served by reliance on competition rather than regulation. See Pet. App. 124a-133a. Thus, the Commission's approach better serves the needs of the listening public than the court of appeals' format doctrine, and does so at a lesser cost to broadcasters' legitimate First Amendment interests. It is the court of appeals' format doctrine, not the Commission's Policy Statement, which threatens substantial and unnecessary injury to First Amendment values.[7]

Respondents misconceive our analysis of the "least restrictive alternatives" doctrine. We agree that the government is not required to adopt the least restrictive method of statutory administration in all instances. The requirement is only that any intrusion into fundamental liberties "be viewed in the light of less drastic means for achieving *the same basic purposes*." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960) (emphasis supplied). Plainly, the Commission need not adopt a less restrictive policy if that would not suffice to achieve an important statutory

[7]Contrary to respondents' claim (Br. 89), the Commission's approach poses no threat to the First Amendment rights of non-English speaking listeners. The Commission's Policy Statement deals only with entertainment programming. See note 3, *supra*. Radio broadcasters continue to have the obligation to ascertain the informational needs and particular problems of persons in their service areas, including non-English speaking listeners. See *Ascertainment of Community Problems*, *supra*, 57 F.C.C. 2d at 442, 444. Thus, there is no basis whatever for respondents' assertion (Br. 90) that entertainment formats provide "the only viable and effective broadcast vehicle for informational and public affairs programming available to such minority groups." See *Marsh Media*, 67 F.C.C. 2d 284, 291-292 (1977) (Chairman Ferris, concurring). See also note 8, *infra*.

objective. But where, as here, the less restrictive alternative is best adapted to achieve both the statutory objective and to preserve the freedom of broadcasters, that alternative is to be preferred under the First Amendment.[8]

Respondents also argue (Br. 84-86) that there is no empirical evidence showing that the court of appeals' format doctrine has a chilling effect on broadcasters' exercise of First Amendment rights. But the record belies this claim.[9] The Commission was entitled to draw reasonable inferences from this evidence, other comments, and its own knowledge of the broadcast industry, and to give recognition to the principle that "[i]t is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 66 (1963). The Commission's analysis of the chilling effect of format regulation was thorough and reasoned, and should have been sustained by the court of appeals. See our initial brief at 55-56.

[8]The Commission has pursued diversity in entertainment programming by making new frequencies available to minority-controlled broadcasters. See our initial brief 57-58 n. 42. See also *Clear Channel Broadcasting in the AM Broadcast Band*, F.C.C. No. 80-317 (June 20, 1980), 45 Fed. Reg. 43172, 43181-43182 (1980). Although respondents argue that these structural reforms are unrelated to the goal of programming diversity, this Court has accepted the Commission's long-standing view that structural diversity promotes programming diversity. See, *e.g.*, *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 780 (1978).

[9]One broadcaster stated that he "would never have started this [unique] all news [format] if there was any possibility of being locked into [it] * * *" (C.A. App. 430). And an expert witness who presented an extensive statement to the Commission expressed his opinion that government format regulation would curtail experimentation and discourage innovation in programming (App. 74).

3. Respondents argue (Br. 42-53) that the Commission's consideration of a staff analysis paper, prior to public comment thereon, violated the Administrative Procedure Act and the Due Process Clause, and that this action is a separate basis for affirming the decision of the court of appeals. That contention is without merit. The court of appeals specifically disclaimed reliance on this alleged procedural error as a basis for reversing the Commission (Pet. App. 17a n.24). And it did so for good reason, since the Commission's review of the staff analysis paper does not constitute reversible error.

a. Respondents have wholly failed to demonstrate why, in an informal policy-making proceeding such as this, adversarial testing of a staff paper discussing publicly available data is essential.[10] Section 553(b)(3) of the APA,

[10]Rather than being a long-withheld study, as respondents suggest, the work reflected in the staff analysis paper was commenced and completed "shortly before" its public release. See Pet. App. 183a n.3. The paper, which was attached as an appendix to the Commission's July 30, 1976 Policy Statement, and which was subject to rebuttal prior to the Commission's August 25, 1977 order denying reconsideration, contained: 1) an evaluation of certain economic arguments and a straightforward statistical study of publicly available format and audience rating information; 2) a table listing radio stations and formats in the top 25 markets, taken from a commonly available industry reference book; 3) a table listing subcategories of 18 different formats, taken directly from the same public reference book and 4) a table displaying the results of a statistical analysis of the relationship between audience ratings and radio format types in the same 25 markets, also based on readily available public data. See Pet. App. 156a-170a. A memorandum further explaining the paper (C.A. App. 71-73), along with the computer printouts relating to the staff's data (*id.* at 76-87), was released shortly after being produced as an accommodation to a Freedom of Information Act requester (*id.* at 68-69). This material was also placed in he public docket in the present proceeding. As a further accommodation to the Freedom of Information Act requester, an explanation of the numbers in the computer printout was prepared and released in March 1977. This

5 U.S.C. 553(b)(3), which governs informal proceedings such as these, requires only that prior "general" notice be given of the "terms or substance of the proposed rule or a description of the subjects and issues involved." Disclosure of the proposed rule or the issues to be considered facilitates meaningful public comment, but there is no requirement of advance disclosure of each piece of information that the agency may consider.[11] And as this Court's decisions clearly establish, additional procedural requirements should not be engrafted on the Administrative Procedure Act by the judiciary. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524, 543 (1978); see also *Costle* v. *Pacific Legal Foundation*, No. 78-1472 (Mar. 18, 1980), slip op. 16. Whether additional procedural safeguards, beyond those prescribed by Congress, should be adopted in particular rule-making contexts is a question addressed to the administrative agency's discretion. *Ibid.*

explanation was likewise placed in the public docket. C.A. App. 573-575. Respondents claim that they did not see this last item until after the Commission's August 1977 reconsideration order.

[11]See *B.F. Goodrich Co.* v. *Department of Transportation*, 541 F. 2d 1178, 1184 (6th Cir. 1976), cert. denied, 430 U.S. 930 (1977). "Informal" rule-making proceedings would be encumbered with extraordinary procedural complexity if administrative agencies were required to give separate notice and solicit public comment whenever their staff members prepared a paper discussing publicly available information. A petition for reconsideration is the statutory vehicle for obtaining public criticism of the staff's analysis. See *Hercules, Inc.* v. *EPA*, 598 F. 2d 91, 129 (D.C. Cir. 1978). Moreover, the Administrative Procedure Act itself contemplates that administrative agencies may maintain the confidentiality of pre-decisional communications between the staff and the agency. See 5 U.S.C. 552(b)(5); *NLRB* v. *Sears Roebuck & Co.*, 421 U.S. 132, 150-154 (1975); *EPA* v. *Mink*, 410 U.S. 73, 85-90 (1973).

These considerations are particularly compelling in this case, since the Commission's staff did not create new data or conduct scientific tests, the results of which were unavailable to the public. All of the information considered by the staff was publicly available and was open to comment and analysis by any party, and was directly related to the issues on which the Commission had expressly solicited public comment.[12]

b. Still more fundamentally, respondents have failed to demonstrate that the staff analysis paper was material to the Commission's decision, or that their belated commentary on the staff's paper is significant. The staff's paper was clearly not an indispensable element in the Commission's determination. The study merely "len[t] further credence" (Pet. App. 129a) to the Commission's experience-based conclusion that the court of appeals' "format doctrine" is infeasible to administer and counter-productive. There is no suggestion that, absent the staff analysis paper, the Commission would have reached a different result. Moreover, the staff analysis paper was

[12]This case has no similarity to the cases on which respondents rely (Br. 42, 50-51), in which scientific tests or expert studies produced new information that interested parties had no means to anticipate or analyze. See, *e.g.*, *United States* v. *Nova Scotia Food Products Corp.*, 568 F. 2d 240, 249-252 (2d Cir. 1977); *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F. 2d 375, 392-395 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974). Cases such as *Aqua Slide 'N' Dive Corp.* v. *CPSC*, 569 F. 2d 831, 837, 842 (5th Cir. 1978), and *Mobil Oil Corp.* v. *FPC*, 483 F. 2d 1238 (D.C. Cir. 1973), which concern proceedings subject to the "substantial evidence" standard, have no application in this informal rule-making context. See generally *Action for Children's Television* v. *FCC*, 564 F. 2d 458, 477-478 (D.C. Cir. 1977). We also note that many of the lower court decisions relied on by respondents antedate this Court's decision in *Vermont Yankee*. To the extent that they impose additional procedural requirements in rule-making proceedings, their authority has not survived *Vermont Yankee*.

cumulative of other data and expert commentary submitted by interested parties in this proceeding. See, *e.g.*, App. 23-92. That data and commentary were subject to adversarial testing. Finally, neither respondents nor any other parties have ever advanced any substantial objections to the correctness of the staff's analysis that would require the Commission to exclude the study from consideration.[13]

In sum, even viewing respondents' arguments about the staff analysis paper in the light most favorable to them, they fail to show any basis for vacating the Commission's policy interpretation. That interpretation rests firmly on the Commission's construction of its own organic statute, on its actual experience in attempting to administer the "format doctrine," and on its predictive judgment. This Court has recognized that administrative agencies may adopt policies based on predictions and accumulated experience. "[C]omplete factual support in the record for the Commission's judgment or prediction is not possible

[13]Respondents belatedly off (Br. 49 n.111) several minor criticisms of the staff analysis paper. Those criticisms could have been presented to the Commission and are not properly raised for the first time in this Court. See 47 U.S.C. 405. In any event, respondents' contentions are without substance. The "equation" that respondents complain was withheld was an elementary application of regression analysis and Table 3 of the staff paper is capable of easy comprehension by any person with even minimal training in statistics. Contrary to respondents' suggestion, the data concerning the top 25 markets were not used to prove the extent of diversity in smaller markets, but rather were used to show the subjectivity of format categorization. The data also illustrate the proposition that disparity in listener interest in different stations of the same general format type would make "format regulation" a fruitless undertaking. Moreover, there is no reason to conclude that the general inferences drawn from this data would be inapplicable to smaller markets. Finally, respondents plainly err in claiming that the staff study included only "147 stations." The study considered 837 stations. See Pet. App. 168a; C.A. App. 74.

or required." *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, 436 U.S. at 814.

For the foregoing reasons and those stated in our initial brief, the judgment of the court of appeals should be reversed.

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OCTOBER 1980

DOJ-1980-10